

One Law, Two Justices

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Poland's prolonged rule of law crisis goes beyond the political and legal to the psychological. Those who believe in the value of respect for the law, the inviolability of the constitution and the independence of the courts have seen the things they believe in ruthlessly destroyed. They are likely to be experiencing a psychological trauma.

A Question of Revenge

This psychological dimension should not be underestimated as it is entwined with the desire both for a return to normality and for justice. Whenever I have spoken publicly about the rule of law crisis, both at public meetings and to the media, I have been asked two questions: the first concerns revenge, the second concerns restoring order. Will those who caused the crisis be punished – will they be “taught a lesson”, put in prison? And can the mess be cleared up – will we be able to restore respect for the Constitution, courts, public prosecutor's office and other public institutions?

The answers to both questions are closely related. The style in which Poland will punish those behind the crisis once it is over will determine whether and how quickly we will be able to restore order. The style in which we restore order will determine the moral authority of those doing the punishing as will perceptions of fairness of that punishment.

A Question of Style

Some of the proposals for restoring post-crisis order focus on effectiveness to the exclusion of any other considerations. For example, one prominent politician, Ludwik Dorn, noted that if the winners of the next elections wish to restore the previous constitutional order for the Constitutional Tribunal and the courts, they will have to revert to legal measures identical to those used by the current authorities against those institutions. The current authorities breached the Constitution to put their own judges in place of those appointed by the previous parliament, so the argument goes that those judges should be removed in similar fashion. Similarly, the current authorities have paralyzed the Constitutional Tribunal, so after the next election, that body should be dissolved by an act of parliament (even though that breaches the Constitution) and a new one appointed. In other words: the mess that was caused by disregarding procedures, lawfulness and the Constitution should be cleaned up by disregarding procedures, lawfulness and the Constitution.

This approach would be a reciprocal answer to the events of recent months, but would it be a fair one? Despite the psychological charm of giving someone a taste of their own medicine, such behaviour realizes the most dangerous threat that the recent breach of the rule of law in Poland has created: the risk of the breach becoming a precedent, and the precedent becoming a norm. Understanding and unravelling this complexity requires a review of Poland's rule of law crisis.

Two Types of Justice

The source of the crisis is the present authorities' very peculiar understanding of the relationship between procedural justice and substantive justice. Procedural justice is attained through compliance with formal legal requirements and by basic procedural guarantees: the right to have a case heard by an independent court, the right to defense, the freedom from self-incrimination and the lawfulness of the evidence submitted. Substantive justice is achieved by giving every person what he deserves: penalizing the bad, rewarding the good, giving the innocent peace of mind.

Among experts, procedural justice is considered a means of achieving substantive justice, but the current Polish government sees things otherwise: for them, procedural justice is an obstacle to achieving substantive justice.

For example, members of the current Polish government treat the presumption of innocence as an expression of the prosecutor's gullibility: for example, immediately following the arrest of a surgeon in 2007, the then and current Minister for Justice (Zbigniew Ziobro) stated that the surgeon would never again deprive anyone of life. When the case came to trial and the evidence heard, the surgeon was exculpated.

Another example of the perception of procedural justice as an obstacle to the achievement of the substantive variety can be seen in the way the current government perceives judges, who, instead of their standard role of impartial guarantors of justice, are considered agents of a deep state. This was illustrated by the accusation of Member of Parliament, Arkadiusz Mularczyk, during debates preceding the 2007 lustration law, that the Constitutional Tribunal judges cooperated with the communist secret police, the implication being that they were unlikely to deliver justice. This claim was later enhanced by PiS leader Jarosław Kaczyński, who advanced the theory that the law hinders rather than helps the pursuit of what is right.

Originally expressed ten years ago, those convictions are now back in full force under an invigorated (majority) PiS government whose eagerness to pursue substantive justice has most recently imperiled the separation of powers. The perceived redundancy of procedural justice is reflected in the government's approach to the Constitutional Tribunal and the judiciary: the independence of the Constitutional Tribunal is secondary to the need for it to be composed of people who understand the government's sense of justice; the independence of judges in the courts is secondary to the achievement of the government's substantive objectives.

These convictions are reinforced by the appointment of a reprivatization commission, which, in line with the intention of its creators, is to replace inefficient courts in restoring justice in this politically charged area. Managed by a non-lawyer and composed of politically-aligned members, the commission has judicial powers. Ultimately a kangaroo court, the commission is a manifestation of the belief that it is not institutions but individuals that ensure fair judgments. What is more, it has been hailed by PiS leader Jarosław Kaczyński as the prototype for a solution that may be used in other areas if it works in the current one, heralding the systematic waiver of the guarantees provided by procedural justice.

Faith in Individuals, not in Institutions

A recent parliamentary commission investigation into the 2010 Smoleńsk plane crash (in which almost 100 Polish state representatives died, including President Lech Kaczyński) provides a vision of the brave new world in which substantive justice prevails over the procedural variety. A strong internal conviction about what really happened in Smoleńsk leads to the dismissal of evidence which does not fit within the framework of that conviction, and to coherence being sought in facts that firmly refuse to be coherent. Similarly, a strong individual conviction that someone is guilty or about what is unfair leads to facts being interpreted subjectively to fit the theory.

The structural similarity between the search for the truth about Smoleńsk and the search for justice is also visible in the authorities' approach to relations between an institution (commission or court) and the people who make up that institution. If the effect of the work of a given institution does not meet the authorities' expectations, the discussion does not concentrate on whether the findings are correct or the truth-seeking procedure appropriate. Rather, the focus switches to proving that the composition of the commission or court is inappropriate and personal attacks are launched against those individuals. The inevitable conclusion is that the members of the institution need to be replaced.

This scenario arises from the conviction that institutions and procedures do not guarantee the truth, but that the individual conducting the proceedings do. Similarly, immutable laws of physics and established constitutional regulations do not determine the final outcome of a case; the investigator's internal conviction about truth or justice do.

History Lessons

History teaches us that attempts to achieve substantive justice at the cost of procedural justice have always led to disaster: the Inquisition, witch-hunts, kangaroo courts such as the *Volksgerichtshof* and politically-motivated trials provide ample evidence that the perception of justice and justice itself are seldom aligned. Each of those cases disregards the great fault of human nature – bounded rationality: our individual thinking patterns tend towards extreme bias based on subjective assumptions, stereotypes and prejudice. Our conviction that someone is guilty leads us to search for confirming evidence and to disregard doubts, while our faith in the legitimacy of our objectives leads us to believe that the end justifies the means. In pursuit of that end, we make serious sacrifices: someone's freedom, someone's values and, in extreme cases, someone's life.

It is such historical experience of substantive justice that has led Western culture to have so much faith in procedural justice. In addition to respect for the formal side of law, its basic elements are checks and balances: the defense attorney weighs in against the public prosecutor, the Constitutional Tribunal checks the parliament, the executive authorities are counterbalanced by independent judicial ones. This balanced structure protects us from the bounded rationality of either party and ensures a thorough examination of facts and elimination of bias to arrive at truth and justice.

The Wisdom of Weakness

Poland's rule of law crisis stems from the conviction that respect for institutions and the requirement to observe procedures are for the feeble or the gullible. With power currently seen as a permit to do what you think is right, making sacrifices and disregarding imponderables, the greatest risk in removing the effects of the crisis is to cure a breach of procedure with another breach of procedure. This will simply replicate the precedent, strengthening the effects of the crisis instead of weakening them.

The conviction behind modern legal systems is that true justice can be achieved only by unconditionally complying with the requirements of procedural justice. Although compliance makes modern societies seem enslaved by procedure, only compliance to procedure secures substantive justice. Therefore, to remedy Poland's current predicament and ensure the crisis is not perpetuated, every effort should be made to remove its effects in full compliance with constitutional requirements and respect for the values trampled underfoot by those who caused that crisis. Those efforts need to start now, at least intellectually.

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